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No. 87-104

In the Supreme Court of the United States

OCTOBER TERM, 1987

SYLVIA BARNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Cases: Page

Alabama Electric Coop. v. *United States*, 769 F.2d 1523 (11th Cir. 1985) ---------- 7

Anderson v. *Liberty Lobby, Inc.*, No. 84-1602 (June 25, 1986) ---------- 4, 8

Aslakson v. *United States*, 790 F.2d 688 (8th Cir. 1986) ---------- 6-7

Begay v. *United States*, 768 F.2d 1059 (9th Cir. 1985) ---------- 6

Celotex Corp. v. *Catrett*, No. 85-198 (June 25, 1986) ---------- 8

Dalehite v. *United States*, 346 U.S. 15 (1953) ---- 5

Drake Towing Co. v. *Meisner Marine Const. Co.*, 765 F.2d 1060 (11th Cir. 1985) ---------- 7

Indian Towing Co. v. *United States*, 350 U.S. 61 (1955) ---------- 6

United States v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) ----------2-3, 4, 5-6, 7

Statutes:

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*---- 2

28 U.S.C. 2680(a) ---------- 1, 2

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the holding of the courts below that their claims that the government negligently failed to warn uranium miners in the 1940s and 1950s of the possible dangers of radiation exposure are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

1. Petitioners are former uranium miners (or their survivors) who worked in privately owned and operated mines in Utah in the 1940s and 1950s. Petitioners brought suit against the United States under

the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, contending that the government negligently failed to establish and enforce radiation safety standards in the underground mines where the miners worked and negligently failed to warn the miners of the possible dangers of radiation exposure, all resulting in injury to petitioners.

The district court granted the government's motion for summary judgment (Pet. App. B1-B11), ruling that the United States is immune under the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), from liability for the acts and omissions alleged.[1] Noting that the "parties agree[d] that the [Public Health] Service [PHS] undertook a study of the health effects of mine radiation [over 35 years ago] and failed to disclose the study results to the affected miners," the district court determined that "the critical question is whether the decision not to warn is appropriately characterized as 'discretionary' " (Pet. App. B3, B4-B5). The district court rejected as "immaterial" factual disputes between the parties "over the status of the government officials who made the decision not to warn," stating that " 'it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.' " Pet. App. B4, quoting *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig Airlines*), 467

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[1] Section 2680(a) precludes the exercise of jurisdiction by the federal courts over "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

U.S. 797, 813 (1984).[2] In the district court's view, "the decision not to warn was discretionary" because it was motivated by "two considerations," both of which "involved the type of policy judgments which are at the core of the discretionary function exception" (Pet. App. B5). Those two considerations were: (1) the impossibility of conducting the study "without secrecy," because the private mine owners "conditioned access to the mines upon an agreement that the government would keep the study results from the miners"; and (2) a concern for "national security," in that the AEC "feared that informed miners would flee the mines and thereby threaten the nation's uranium supply" (*ibid.*).[3]

The court of appeals affirmed (Pet. App. A1-A11). The court first rejected petitioners' contention that summary judgment was improper because material issues of fact remained in dispute. Noting that

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[2] The district court also rejected as "immaterial" other factual disputes between the parties concerning when and how the PHS study began, the objectivity of the study, and the degree to which the government knew of the radiation danger when the study began. Pet. App. B3-B4. In the view of the district court, these disputes all related to the "negligence issue," while "the discretionary function exception immunizes discretionary acts whether they are negligent or not." *Id.* at B3.

[3] The district court also rejected petitioners' contention that the discretionary function exception did not apply to their claims of a violation of a "good samaritan" undertaking or of "professional negligence" on the part of the PHS physicians who conducted the mine study. Pet. App. B5-B7. It further concluded that neither the PHS nor the Atomic Energy Commission (AEC) had a mandatory duty to regulate uranium mine safety and, hence, any claim based upon an alleged failure to regulate was similarly barred by the discretionary function exception. *Id.* at B7-B10.

" 'the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion,' " the court of appeals agreed with the district court that the factual disputes among the parties "were irrelevant to the issue whether the government's acts were discretionary." *Id.* at A6, quoting *Anderson* v. *Liberty Lobby, Inc.*, No. 84-1602 (June 25, 1986), slip op. 5 (emphasis in original). The court noted that petitioners had failed to controvert the government's showing that the failure to warn was motivated, in part, by "the AEC's concern that informed miners would flee the uranium mines and threaten the nation's uranium supply." Pet. App. A7. Relying on this Court's reasoning in *Varig Airlines* (467 U.S. at 813-814), the court observed that it is "the nature of the conduct rather than the status of the actor" (Pet. App. A5) that determines whether the discretionary function exception applies. Accordingly, since "the decision not to advise the miners of the health risks was based on political policy * * * the decision not to warn was discretionary" (*id.* at A8).[4]

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, as the district court stated, the government's decision not to warn in this case "involved the type of policy judgments which are at the core of the discretionary function

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[4] The court of appeals also rejected petitioners' contention that the government had breached an alleged nondiscretionary "medical" and/or "good samaritan" duty to the miners. Pet. App. A8-A9. And it affirmed the district court's determination that the AEC did not have "a mandatory duty imposed by statute to protect the health of the uranium miners." *Id.* at A9-A11. Petitioners do not press any of these claims.

exception" (Pet. App. B5). Further review is therefore not warranted.

a. Petitioners' primary contention is that this Court's decision in *Varig Airlines*, enunciating a "nature of the conduct" test for the discretionary function exception, has produced substantial confusion in the courts of appeals, and in particular has misled some courts to the conclusion that the planning/operational test set forth in *Dalehite* v. *United States*, 346 U.S. 15 (1953), is no longer the law (Pet. 6). In petitioners' view, Duncan Holaday—the chief PHS uranium mine investigator, whom petitioners allege "was *the* federal actor" (Pet. 4 (emphasis in original))—would "have been deemed an operational employee of the federal government" under *Dalehite*, in which case "petitioners would have prevailed" in the court of appeals (*ibid.*). Instead, "by giving a sweeping interpretation to language in" *Varig* (*ibid.*), petitioners allege that the courts below incorrectly held for the government. This contention is without merit and does not warrant further review.

Both of the courts below correctly followed the test established by this Court in *Varig Airlines* for application of the discretionary function exception and examined the "nature of the conduct" at issue, "rather than the status of the actor," to determine whether the exception was applicable. Pet. App. A5, A7, B5; *Varig Airlines*, 467 U.S. at 813. That approach is fully consistent with all of this Court's decisions. Indeed, in *Varig*, this Court explained that such an approach is perfectly consistent with its prior decision in *Dalehite*: "As the Court pointed out in *Dalehite*, the exception covers '[n]ot only agencies of government . . . but all employees exercising discretion.' 346 U.S., at 33. Thus, the basic in-

quiry concerning application of the discretionary function exception is whether the challenged acts of a Government employee—*whatever his or her rank*—are of the nature and quality that Congress intended to shield from tort liability." 467 U.S. at 813 (emphasis added). Hence, petitioners are incorrect in arguing that Duncan Holaday's rank or status governs the application of the exception, or would have prior to this Court's decision in *Varig Airlines*.[5]

Furthermore, the decision below is consistent with *Begay* v. *United States*, 768 F.2d 1059, 1065 (1985), where the Ninth Circuit, faced with virtually identical facts in a case brought by another set of uranium miners, concluded that the "decision reached by Holaday, not to disclose the possible dangers of uranium mining to the miners, was based on his judgment of what the best course of action was under the existing circumstances" and therefore was protected under the discretionary function exception. Petitioners' argument that Holaday should be classified as an "operational" employee and that the United States should be held liable for failing to warn uranium miners of the dangers of radiation is, therefore, contrary to the decisions of both federal courts of appeals that have considered the matter. There is, accordingly, no warrant for further review of this issue by this Court.[6]

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[5] Petitioners also contend (Pet. 6) that the "planning/operational" distinction is supported by this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955). However, there was no discretionary function issue in *Indian Towing*, since the government had conceded the exception was inapplicable, and thus that case does not support petitioners' argument. See *Varig*, 467 U.S. at 811-813 & n.10.

[6] Petitioners suggest (Pet. 9 n.3) that the decisions in this case are in conflict with the decisions of the Eighth Circuit in

b. Petitioners also persist (Pet. 7-8) in their contention that summary judgment was inappropriate in this case because "there was no evidence to support" the district court's conclusions (1) that "the study would not have been possible without secrecy," and (2) that the AEC's "concerns about national security influenced the decision not to warn" the miners (Pet. App. B5). These fact-bound contentions are without merit and do not warrant further review.

Petitioners' first contention is surprising since pe-

Aslakson v. *United States*, 790 F.2d 688 (1986), and the Eleventh Circuit in *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060 (1985), and *Alabama Electric Coop.* v. *United States*, 769 F.2d 1523 (1985), concerning the scope of the discretionary function exception. There is no conflict. In *Aslakson*, the court concluded that the alleged negligence in allowing insufficient vertical clearance of electrical transmission lines "involve[d] safety considerations under an established policy rather than the balancing of competing public policy considerations" and was consequently unprotected by the discretionary function exception (790 F.2d at 691, 693-694). Similarly, in *Drake Towing*, the court of appeals examined the " 'nature and quality of the discretion involved' " to conclude that, while the decision to place aids to navigation was discretionary (and therefore protected), "[o]nce such aids are established * * *, negligence in their maintenance and operation implicates operational functions and is actionable" (765 F.2d at 1064-1065 (citation omitted)). Finally, in *Alabama Electric*, involving an action for property damage resulting from erosion, the court of appeals remanded that case for determination whether the design decisions resulting in the harm involved " 'social, economic [or] political policy' " judgments (769 F.2d at 1527, 1528-1529, 1537 (citation omitted)). Thus, all of these decisions recognize (as did the courts below) that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case" (*Varig Airlines*, 467 U.S. at 813).

titioners' affidavit in opposition to summary judgment conceded that "the decisions * * * not to warn the individual miners of the radiation risks * * * [were made] as part of a quid pro quo with the private companies who were mining uranium * * * in order to persuade said companies to allow Federal officials to inspect their uranium mines" (Pet. App. D2). The district court's determination that it was undisputed that "the study would not have been possible without secrecy" (*id.* at B5) is therefore entirely correct.

Petitioners' second contention is also without merit. As the court of appeals noted, "[t]he record indicates that the United States supported its motion for summary judgment with exhibits demonstrating the AEC's concern that informed miners would flee the uranium mines and threaten the nation's uranium supply" (Pet. App. A7), and that petitioners failed to respond to that demonstration with specific facts showing the existence of a genuine issue for trial. Under these circumstances, the entry of summary judgment against petitioners was entirely appropriate. See *Anderson* v. *Liberty Lobby, Inc.*, slip op. 5; *Celotex Corp.* v. *Catrett*, No. 85-198 (June 25, 1986), slip op. 4-8.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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